

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
GRAY, et al., : 14-cv-02488-MKB-MDG
Plaintiffs, :
 :
- versus - : U.S. Courthouse
 : Brooklyn, New York
 :
CITY OF NEW YORK, et al., : March 30, 2016
Defendants :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE
BEFORE THE HONORABLE MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

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1 THE COURT: Gray v. City of New York, docket
2 number 14-cv-2488.

3 Will counsel appearing by telephone for this
4 discovery hearing please state their names for the
5 record? For the plaintiffs?

6 MR. HUESTON: Sure, your Honor, Michael Hueston
7 and Richard Cardinale for the plaintiffs.

8 MR. JOHNSON: Paul Johnson and Alan Scheiner
9 for defendants.

10 THE COURT: And I understand at the request of
11 the Court, Mr. Ricco is one the line, too. Could you
12 state your name?

13 MR. RICCO: Yes, I am, your Honor. Good
14 afternoon.

15 Anthony Ricco on the line at the request of the
16 Court.

17 THE COURT: And I do that -- we invited you to
18 participate because you're the attorney and the client
19 involved, of course, is not participating. I guess he
20 was incarcerated for other matters unrelated to this
21 case.

22 But I've reviewed the papers and actually, I
23 think the decision is fairly straightforward.

24 MR. HUESTON: Your Honor, we just want to say
25 we did try to serve papers on his previous counsel but we

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1 weren't able to track down his current counsel.

2 THE COURT: Okay. I'm not sure it's necessary
3 at this juncture but let me proceed. I think there are
4 two -- as a preliminary matter, the Court has to decide
5 whether or not there was any attorney-client privilege
6 that was established and certainly the Second Circuit has
7 made clear, the burden of establishing the existence of
8 the attorney-client privilege rests with the party
9 asserting it and among the cases, I cite In re Grand Jury
10 Proceedings, 218 F.3d at -- 219 F.3d at 182.

11 And I think it's equally clear that preliminary
12 discussions between a witness and an attorney can be
13 privileged, even if the witness does not retain an
14 attorney as numerous courts have recognized, including
15 United States v. DeBerry (ph.), a 1995 case from the
16 Southern District. And the Second Circuit noted in
17 United States v. Dennis, 843 F.2d at 657, the key to
18 whether or not the relationship existed is the intent of
19 the client and whether he reasonably understood the
20 conference to be confidential.

21 Now, I mean based on certainly the testimony of
22 Mr. Ricco, I think it's clear that although he was acting
23 in a pro bono capacity, he was requested by Mr. Fraser to
24 represent him as an attorney. So I find that there was
25 an attorney-client privilege that was ultimately

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1 established.

2 And communications leading to the retention,
3 even though the retention of Mr. Ricco did not occur
4 under normal circumstances where the client seeks
5 counsel, I think doesn't change the analysis or my
6 conclusion at all.

7 However, as the defendants argued in their
8 initial papers that there may be a waiver here because
9 the communications in the presence of a third-party are
10 not privileged. And, you know, the confidence that
11 courts expect in discussions between an attorney and a
12 client has to be preserved and so unless the confidential
13 statements are maintained, there -- the privilege can be
14 pierced as the Second Circuit recognized in *United States*
15 *v. Mejia*, 655 F.3d at 134.

16 And the testimony of Mr. Ricco makes clear and
17 I don't think plaintiff disputes that but the
18 investigator retained by plaintiff's counsel was present
19 throughout the interview between Mr. Ricco and Mr.
20 Fraser.

21 I view Mr. Hinckson (ph.) as a --

22 MR. RICCO: Judge, that's not a true statement.

23 THE COURT: What (indiscernible)? Okay.

24 MR. RICCO: That's what the City said in its
25 papers but that's not a true statement.

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1 THE COURT: Isn't that what you said in your
2 deposition testimony?

3 MR. RICCO: Mr. Hinckson, the statement at the
4 -- that took place at the apartment where he is
5 discussing with me what happened, Mr. Hinckson is in the
6 apartment but he is not in the living room where the
7 conversation is taking place between myself, and Jaquan
8 Fraser and his grandmother. Now his grandmother is
9 certainly present, your Honor.

10 THE COURT: Yes. Okay. I misunderstood. I
11 guess I will -- let me just flip through the pages. I
12 guess it's not made clear actually.

13 MR. RICCO: I think that's a fair statement,
14 your Honor, because, you know, those are the questions
15 that the City posed and they very -- their letter that
16 they wrote to you is not only filled with inaccuracies as
17 -- is right out, saying things that just weren't said.

18 And it's very simple, Judge, Mr. Hinckson
19 definitely drove me there. He was at the apartment as
20 were two other young people, whose names I don't recall,
21 but the conversations between myself and Jaquan Fraser
22 and his grandmother took place in the living room area.
23 Mr. Hinckson wasn't sitting in during that part of the
24 conversation.

25 And they asked me questions about the trip

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1 back, because we did go back and they asked me questions
2 about picking him up at school, which Mr. Hinckson did
3 and they specifically asked did we discuss anything when
4 we picked him up from school and the answer to that was
5 no, because we didn't.

6 THE COURT: Did you have discussions in the car
7 after the first interview with Mr. Fraser?

8 MR. RICCO: Yes, Judge, but not about anything
9 that Mr. Fraser during the interview.

10 THE COURT: Mr. Johnson? Hello?

11 MR. JOHNSON: I'm here, your Honor. Sorry, I
12 was just getting my paperwork out on that. And it was
13 the City's position that Hinckson was present when Ricco
14 spoke with Fraser's grandmother and that the --

15 THE COURT: Well, where is that made clear? I
16 had assumed that was the case just from what -- from the
17 lack of any statement otherwise. We know that Mr.
18 Hinckson drove Mr. Ricco to the Fraser -- to Mr. Fraser's
19 apartment and he drove him back.

20 Mr. Ricco is now clarifying and said that the
21 interview took place in the living room outside of the
22 presence of Mr. Hinckson and the two young people whose
23 names he doesn't remember.

24 MR. SCHEINER: You know, this is Alan Scheiner.
25 I was also present at the (indiscernible).

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1 THE COURT: I'm sorry, I can barely hear you.

2 MR. SCHEINER: This is Alan Scheiner, your
3 Honor. I was also present at the deposition and your
4 Honor has the full transcript. Certainly, our
5 interpretation or rather our understanding of what
6 (indiscernible) depositions is exactly as we described it
7 and I gather from your Honor's comments (indiscernible).

8 I think that what Mr. -- we would think
9 constitutes a change to the deposition testimony but it
10 also raises further questions such as where was Mr.
11 Hinckson during this conversation? In some apartments,
12 there's really no difference between a living room and a
13 dining room. They're right next to each other. They're
14 open to each other.

15 So I think it raises the question well, if he
16 was in the living room, where was he and who was he with
17 and what was he doing?

18 MR. RICCO: I can answer that right now.

19 MR. SCHEINER: (Indiscernible) appear to me --
20 I'm sorry, I am speaking (indiscernible) -- that, you
21 know, we can't really be sure from Mr. Ricco's amendment
22 to the deposition whether there was confidentiality or
23 not.

24 THE COURT: I --

25 MR. SCHEINER: So I think we should hear more

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1 about that.

2 MR. RICCO: Well, Judge, I would go to page 28
3 of the deposition where he asks me the question and I
4 answered it and he didn't bother to answer -- any follow-
5 up questions or anything about that. If he was really
6 interested in that, he would have asked it.

7 MR. SCHEINER: Well, your Honor, we didn't ask
8 because we thought that Mr. Ricco was telling us that
9 (indiscernible) conversation.

10 MR. RICCO: Judge, I'm speaking now.

11 THE COURT: As to --

12 MR. RICCO: Judge, I would say this --

13 THE COURT: Stop, stop, Mr. Ricco.

14 MR. RICCO: Yes. Sure.

15 THE COURT: It is not clear and there's no
16 specific question on whether or not of where Mr. Hinckson
17 was. Mr. Ricco's testimony on page 28, as he pointed to,
18 was his grandmother was present for that meeting. And
19 there's a question about Mr. Hinckson. There's no
20 question as to where Mr. Hinckson was. If you want to
21 know, I'll hear Mr. Ricco now. Go ahead, Mr. Ricco.

22 MR. RICCO: Judge, Mr. Hinckson was in the
23 dining room area in the accompaniment of the other two
24 people, the other two young people who were present in
25 the apartment and they were engaged in a conversation

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1 when I was sitting down talking to Mr. Fraser and his
2 grandmother in the living room area.

3 The two areas were divided as apartments are
4 divided. I can't tell the Court that a door was shut. I
5 am not going to say that because I don't remember that.
6 But we were in two different areas of the apartment and I
7 specifically had those conversations outside of the
8 presence of Mr. Hinckson and the other two individuals
9 because of the attorney-client privilege. And I took
10 precautions to protect it.

11 MR. SCHEINER: Your Honor?

12 THE COURT: Okay.

13 MR. SCHEINER: If I may?

14 THE COURT: Yes. This is Mr. Scheiner?

15 MR. SCHEINER: Scheiner. Yeah, I am just not
16 clear from what Mr. Ricco said when he said that he
17 doesn't know if his door was shut but it's not clear even
18 if there was a wall between the living room. As I
19 indicated before, not every apartment does not have a
20 wall between them. I --

21 THE COURT: Okay.

22 MR. SCHEINER: -- (indiscernible) --

23 THE COURT: Wait. Stop.

24 MR. SCHEINER: -- (indiscernible) said --

25 THE COURT: Mr. Scheiner?

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1 MR. SCHEINER: -- for as much as we
2 (indiscernible) take it --

3 THE COURT: Stop.

4 MR. SCHEINER: Yes.

5 THE COURT: Was the kitchen in a separate room
6 and was there a wall separating the kitchen area from the
7 living room area, Mr. Ricco?

8 MR. RICCO: Yes, your Honor. I specifically
9 recall that there was a partition up between the area
10 that I was discussing the initial part of the case with
11 discussions between Jaquan Fraser and his grandmother. I
12 specifically remember that there was a partition dividing
13 that off. That we were in a room by ourselves during
14 this conversation and so, your Honor, I don't remember
15 the exact configurations of the apartment. I think when
16 you walk in, you go into a kitchen area and then you go
17 into this main living room area and there were two
18 bedrooms or maybe one bedroom off to the side.

19 Ms. -- Jaquan Fraser and his grandmother and I
20 discussed the representation of him in a separate-off
21 area of that apartment, which I describe as a living room
22 area. And Mr. Hinckson was with the two other
23 individuals in a walled-off separate area.

24 THE COURT: But there was an opening between
25 the two areas.

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1 MR. RICCO: Yes, you can -- because --

2 THE COURT: Was there a door?

3 MR. RICCO: Yeah, it was a doorway. I mean,
4 you had to be able to walk in and out, Judge.

5 THE COURT: But you're not -- you can't
6 remember whether or not the door was shut?

7 MR. RICCO: No, I can't remember if the door
8 was shut but I do know that I felt confident that we had
9 privacy and the reason why we were meeting in that way
10 was so that he could have privacy and that was explained
11 to him.

12 MR. SCHEINER: Your Honor, if I could point to
13 something in the transcript that, you know, I think the
14 (indiscernible) of the original testimony that was
15 received. It's on page 34 -- 35 to 36, your Honor, where
16 we ask Mr. Ricco whether he discussed with Mr. Hinckson
17 the meeting that had occurred with Mr. Fraser and I am
18 going to read from line 18 to line 2 of the following
19 page or rather line 7 of the following page. Mr. Ricco
20 said:

21 "Answer: I think we generally discussed the
22 kids in that neighborhood, familiarity with the
23 neighborhood. It wasn't sort of like an ah-hah moment.
24 We generally talked about the (indiscernible) can't
25 remember any specifics like we discussed, for example,

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1 Jaquan said something and we discussed that in the car
2 (indiscernible). Not necessarily. I don't think there
3 was anything said at the meeting that sort of shocked or
4 surprised Mr. Hinckson. We talked generally about, you
5 know, the case and we also talked about combined belief
6 that it was going to be difficult to get him to
7 participate. We thought that he was just very
8 disillusioned and that turned out to be true."

9 So, your Honor, I want to point out that what
10 Mr. Ricco said at the deposition was I don't think there
11 was anything said at the meeting that sort of shocked or
12 surprised Mr. Hinckson. It really --

13 THE COURT: Mr. Scheiner?

14 MR. SCHEINER: -- is difficult --

15 THE COURT: Mr. Scheiner?

16 MR. SCHEINER: Yes.

17 THE COURT: You had the opportunity to follow-
18 up and question him for -- questioning him further on
19 that point. And I don't quite understand why your
20 decision or failure to follow-up with further questions
21 about that discussion between Mr. Ricco and Mr. Hinckson
22 is the basis for reopening Mr. Ricco's deposition.

23 MR. SCHEINER: Your Honor, my point is that Mr.
24 Ricco testified that Mr. Hinckson heard whatever Mr.
25 Fraser had to say and was not shocked or surprised by it.

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1 That's --

2 MR. RICCO: Judge, I didn't say that at all.

3 MR. SCHEINER: -- (indiscernible) meaning of
4 his testimony that I just read.

5 MR. RICCO: That doesn't say that.

6 MR. SCHEINER: (Indiscernible) said that, "I
7 don't think there was anything said at (indiscernible),"
8 meaning the meeting with Mr. Fraser, "that sort of
9 shocked or surprised Mr. Hinckson." To me, that's a
10 statement that Mr. Hinckson heard the meeting and he
11 wasn't shocked or surprised by it.

12 THE COURT: No, I think this is taken out of
13 contexts. You're talking about a discussion between Mr.
14 Ricco and Mr. Fraser after the meeting. So you drove
15 back with Mr. Hinckson and did you discuss the meeting
16 with him. And he said -- you asked him again and I think
17 we generally discussed the kids in the neighborhood and
18 so forth.

19 So I don't know how you can infer from that the
20 witness' answer in the context of the questioning that
21 Mr. Hinckson was at the meeting between Mr. Ricco and
22 Fraser.

23 MR. SCHEINER: Your Honor, for the -- just I
24 will note it again for the record. Page 35, line 25
25 through page 36, line 2. I think it says exactly that.

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1 It says Mr. Hinckson heard the meeting and he wasn't
2 shocked or surprised by it.

3 MR. HUESTON: Your Honor, this is Michael
4 Hueston. The only thing I would add, really I do think
5 that this is being taken out of context because it seems
6 clear just from my reading of it that is Mr. Ricco was
7 saying it was sort of like -- excuse me, he said, "I
8 can't remember any specifics." That's on line 22. And
9 then he gives examples. And I think that's a fair read
10 of it and I do think -- you know, I don't think that's a
11 fair characterization and I did want to state that.

12 And then in Mr. Ricco seems on page 36, lines
13 3, really gets to the heart of what they're talking about
14 which Mr. Scheiner is not focused on, we talked generally
15 about, you know, the case. We talked about our combined
16 belief that it may be difficult to get him to
17 participate. And then goes on and it ends.

18 So that's it, your Honor. Thank you.

19 THE COURT: It would have been more helpful for
20 the -- in the interest of clarity that there were more
21 questions regarding what the statement meant but I don't
22 think that the -- I don't think from the context of the
23 questioning that Mr. Ricco was saying Hinckson was at the
24 meeting.

25 There is certainly a question whether or not --

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1 in the back of my mind but, you know, I don't understand
2 why that wasn't explored during the deposition of Mr.
3 Ricco. There's a question that well, what general things
4 did you discuss with Mr. Hinckson that he can't remember
5 the specifics and did you talk about was there a
6 discussion regarding what Jaquan said as to what he saw.
7 Anyway, you didn't ask that.

8 MR. SCHEINER: Would you like us to respond
9 or --

10 THE COURT: Go ahead.

11 MR. SCHEINER: I'm not clear whether you want
12 us to (indiscernible) or explain.

13 THE COURT: Explain what? I mean, I will hear
14 you.

15 MR. SCHEINER: Yeah, I mean the answer to why
16 you didn't ask that is because we were both there and we
17 both believed he had told us that Mr. Hinckson -- the
18 investigator was present during the conversation and here
19 he was just saying that again, that he was there and he
20 wasn't surprised by what was said. That's how we read
21 it. We didn't think any more questions were needed.

22 THE COURT: Well, you should have asked him,
23 was Mr. Hinckson in the room with you when you
24 interviewed Mr. Fraser. Why didn't you ask that? You
25 know, it's not -- it definitely isn't clear from the

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1 beginning of the -- earlier in the deposition, that
2 wasn't even the case. Yes, Hinckson drove him there and
3 yes, it's not unfair to assume to assume he might have
4 been there present but now that Mr. Ricco has clarified,
5 it certainly would have made sense for you to have
6 clarified during the deposition.

7 MR. SCHEINER: Well, your Honor, I will also
8 note another question I can anticipate your saying. It's
9 not the question you think we should have asked but it's
10 the other question that I think bears on this. On page
11 34, line 15, (indiscernible) asked:

12 "Question: Did you see Mr. Hinckson take any
13 notes while at Mr. Fraser's apartment that day?"

14 And the answer was:

15 "Answer: No, and it is not that he didn't take
16 notes because someone asked him not to, but I remember
17 the meeting very well. I remember the apartment, the
18 meeting. He wasn't taking any notes that day. It wasn't
19 that kind of meeting."

20 So I don't think that answer makes any sense if
21 Mr. Hinckson wasn't at the meeting. He's talking about a
22 meeting and the question is were there any notes taken
23 and he said it wasn't that kind of meeting.

24 MR. RICCO: No, that's not what the question
25 says. The question says, "Did he take any notes when he

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1 was at the apartment."

2 MR. SCHEINER: And I'm talking about the answer
3 which refers to the meeting. So, it's just another
4 example of why I think the fair inference is that he was
5 at the meeting. But I understand your Honor saying that
6 the burden was on us to ask the question because you feel
7 that the statements were not clear enough. Our view at
8 the time was that they were clear enough. That's why we
9 didn't ask any additional questions because we thought it
10 was clear that he was present. And all I can do is tell
11 you why and point to these sections of the transcript
12 that I think support that -- our inference that he was
13 present.

14 And I also feel that if he's in an adjoining
15 room with an open door, that is not necessarily
16 confidential. When you meet with a client in your
17 office, even in your own law office, typically you close
18 the door. That's standard practice. I don't think it
19 is confidential if you have people in an adjoining room
20 and an open door.

21 MR. RICCO: I think the issue is whether or not
22 the person who is being interviewed believes that they
23 have an expectation of what they are saying is in
24 confidence and that measures are taken to assure that.

25 And that's what happened here. That's simply

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1 what happened here, your Honor. The City is making a
2 mountain out of a molehill. You know, I took steps to
3 protect this young man's rights and interests, given the
4 circumstances that were there. I believed that they were
5 protected. His grandmother -- they felt very
6 comfortable. We -- you know, it was a comfortable
7 setting. We had a --

8 And, your Honor, actually this was a very brief
9 conversation about the case itself. Most of the time was
10 spent talking about his background, his grandmother's
11 background, school, taking responsibility, things of that
12 nature. And I do know that steps were taken to protect
13 confidentiality and to see to it that he was represented.

14 And, you know, counsel could talk about what's
15 done in an office and what he does and doesn't do, it
16 just -- that's not what this situation was, Judge. And
17 if I thought otherwise, your Honor, I would say it.

18 THE COURT: When you testified he wasn't taking
19 any notes that day --

20 MR. RICCO: Yes.

21 THE COURT: -- was that because he wasn't in
22 the room to take notes, is that what you meant?

23 MR. RICCO: That's right, Judge. He wasn't in
24 the room to take notes. You know, I see now that the
25 question was was he taking notes in the apartment. You

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1 know, did I see him taking notes in the apartment. Mr.
2 Hinckson did not have any writing utensils with him. He
3 didn't have a pad, a pen or anything. And he was not
4 sitting in the room where the conversation took place.

5 THE COURT: Okay.

6 MR. SCHEINER: Your Honor, I also want to note
7 that, if I may, this is Alan Scheiner, that although you
8 ruled that you felt that the attorney client relationship
9 would extend to this conversation if it were
10 confidential, as you know, it was Mr. Ricco who initiated
11 this conversation and I do think that there's a question
12 as to when a person who has not sought out legal advice,
13 would all of the sudden have an expectation that they
14 have an attorney-client privilege when they didn't even
15 go out looking for a lawyer. I don't think that has been
16 established.

17 THE COURT: We actually took a look at the
18 disciplinary rule on solicitation and certainly it is
19 permissible when an attorney is acting in a pro bono
20 basis. I don't think there was an assertion of privilege
21 as to the conversations leading to the interview in the
22 living room and though certainly, the preliminary
23 discussions leading third-party the establishment of an
24 attorney-client relationship could also be a basis.

25 But, yes, as I noted, even though the

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1 relationship was precipitated by Mr. Ricco's appearance
2 at the apartment it doesn't mean that a relationship
3 could not have been established.

4 (Court and clerk confer)

5 THE COURT: Mr. Ricco did talk about explaining
6 that he was -- what his role was to represent him and he
7 had asked them if he wanted -- he asked Mr. Fraser and
8 his grandmother whether or not he wanted Mr. Ricco to
9 represent Mr. Fraser.

10 MR. SCHEINER: Well, I think, no, your Honor,
11 that question -- again, my understanding, maybe I misread
12 the deposition this way, too is that's the end of the
13 conversation. So, you know --

14 MR. RICCO: No, you asked that question in the
15 deposition.

16 MR. SCHEINER: And we know when Mr. Ricco --
17 when Mr. Fraser first had this belief that he was having
18 this confidential discussion with someone to be his
19 lawyer rather than a discussion about what happened on
20 the night that he (indiscernible).

21 THE COURT: Well, Mr. Ricco just explained and
22 he stated that he explained to Mr. Fraser why he was
23 there. And I can't put my hands on the right line and
24 page, but Mr. Ricco did confirm that he had asked whether
25 or not they wanted him to represent Mr. Fraser and the

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1 answer was affirmative.

2 I don't know what else -- yes, he -- this is on
3 page 28. "They agreed they wanted representation." Once
4 that occurred, I don't think there's any serious issue as
5 to the establishment of attorney-client relationship.
6 And my -- as I said initially, my concern was whether or
7 not that privilege was waived by the presence of Mr.
8 Hinckson and now that this has been -- plaintiff's
9 counsel has pointed out and Mr. Ricco has elaborated
10 further, it does appear that there's no clear evidence
11 that Mr. Hinckson was in the room at the meeting. There
12 was no specific question about that.

13 So as far as I am concerned, there was a
14 privilege and the discussions at the meeting between the
15 -- the discussion at the meeting between Mr. Ricco, Mr.
16 Fraser and Mr. Fraser's grandmother would be protected by
17 the attorney-client privilege. I'm not persuaded that
18 there has been a showing that that privilege has been
19 waived.

20 MR. SCHEINER: Will there be a written opinion,
21 your Honor?

22 THE COURT: I wasn't intending to but I'll see
23 what I can do to whip up something. I think you've had
24 the benefit of some additional statements by Mr. Ricco.
25 I will just confirm for the record that you made all of

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1 these statements as an officer of the Court, Mr. Ricco?

2 MR. RICCO: Yes, your Honor.

3 THE COURT: Okay. Before we go onto the next
4 issue, is there anything else we need to discuss about
5 this issue?

6 MR. SCHEINER: No, your --

7 MR. HUESTON: Not from plaintiffs, your Honor.

8 MR. SCHEINER: No, your Honor.

9 THE COURT: Okay. You need not continue in
10 this conference if you don't want to, Mr. Ricco.

11 MR. RICCO: Thank you very much, your Honor. I
12 choose not to continue.

13 THE COURT: Okay. I wonder why? Okay. Go
14 ahead and disconnect and I will disconnect you too.

15 MR. RICCO: All right. Thank you very much,
16 your Honor.

17 (Mr. Ricco disconnects from conference.)

18 THE COURT: Okay.

19 MR. HUESTON: We're still here, your Honor.

20 THE COURT: Yes, yes. We have the --

21 MR. SCHEINER: Sorry, I apologize, your Honor,
22 but maybe because we were temporarily unable to hear, we
23 didn't know there was another person on the line. Who
24 was that? Besides Mr. Ricco, was somebody else on the
25 line?

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1 MR. HUESTON: No, there's no one else on the
2 line.

3 MR. SCHEINER: I'm sorry, I thought I heard
4 someone else.

5 THE COURT: Oh, it might have been my other law
6 clerk coming in to tell me about another conference.

7 MR. SCHEINER: Oh, okay.

8 THE COURT: Anyway, on the request for
9 admissions, I don't have the benefit of the reports, so I
10 have no idea whether or not the requests at issue quote
11 the reports as the plaintiff claims and -- or whether or
12 not they are argumentative as the defendants argue.

13 There is certainly an obligation under Rule 36
14 to admit to the extent you can admit and so I will give
15 the defendants an opportunity to amend their responses to
16 admit whatever you think the reports say.

17 MR. SCHEINER: But, your Honor, I think in our
18 response and if the plaintiffs had quoted them, you know,
19 we would admit (indiscernible) nothing is before us in
20 their request to be a quote.

21 MR. CARDINALE: Well, everything but the DNA
22 report.

23 MR. SCHEINER: (Indiscernible) is to prove out
24 the report, that's a different question and we
25 essentially admitted and am certainly happy to admit that

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1 the reports are real and that they say what they say. In
2 other words, they're authentic.

3 But that's not what they asked us. You know,
4 so I think it's apparent that they're not quoting the
5 reports. If they were, then we wouldn't have anything to
6 discuss.

7 MR. CARDINALE: Your Honor, this is Richard
8 Cardinale. Everything in terms of the DNA is taken
9 exactly from the reports.

10 THE COURT: I don't know. I mean, if you want
11 to send me the reports, tell me where they are. I will
12 make a ruling but rather than doing that, I thought we
13 would just cut to the chase and get quotation marks put
14 either in the admissions or making the plaintiff re-
15 propound, you know, the request I -- we already have the
16 defendants agreeing to the existence of the reports and
17 stating that you stand by whatever the reports say. Is
18 that correct?

19 MR. SCHEINER: Yes, your Honor. Yes.

20 THE COURT: Okay.

21 MR. CARDINALE: Your Honor, I put forward case
22 law stating that they can't just say the arrest and it
23 refers to the document -- the document (indiscernible).

24 THE COURT: Yes, but if you want to say these
25 are direct quotes, put direct quotes or I will require

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1 the defendants to respond by admitting as much as they
2 can.

3 MR. CARDINALE: Well, some are direct quotes,
4 your Honor, some are not.

5 THE COURT: I don't know. It's -- that's fine.
6 If they are direct quotes, then put direct quotes on them
7 or to just point out to the defendants.

8 MR. CARDINALE: Right, but not all of them are
9 direct quotes.

10 THE COURT: Yes.

11 MR. CARDINALE: Some of them just state
12 basically that no fingerprints were found. Those aren't
13 direct quotes but I think the City has the obligation to
14 consult with the third parties as I indicated in my
15 letter and find out if that's what, in fact, the reports
16 say. I mean, it's obvious that's what the report say.

17 So for them to say that we're arguing forensic
18 evidence or arguing points that they can't understand as
19 a lay person, that's just false.

20 THE COURT: Look, I think what you could --

21 MR. CARDINALE: (Indiscernible) file it with
22 the response.

23 THE COURT: Wait, wait, wait. You know, look,
24 you could have said like for instance, request number 3,
25 which is short and which is why I picked it, the -- if

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1 you broke it into two parts, they testified the firearm
2 for palm prints and then the second part is that the
3 report states -- does not state that there were any palm
4 prints for Kimani Gray.

5 MR. HUESTON: You would like us to serve new
6 requests, your Honor?

7 THE COURT: You can do it either way or the
8 defendants can reformulate. I think it's probably
9 simpler just to -- for you to re-propound since there's
10 still time left in discovery. And we'll just shorten the
11 time, as long as you're basing your modified request on
12 these particular requests that are in dispute.

13 MR. CARDINALE: But, your Honor, there are
14 certain requests that aren't (indiscernible) to in the
15 report.

16 THE COURT: I'm sorry?

17 MR. CARDINALE: There are certain requests that
18 are not direct quotes. So what we do about those where
19 you basically can conclude by looking at the documents
20 that no fingerprints were recovered but it doesn't say
21 that.

22 THE COURT: Well, I already gave you a --

23 MR. CARDINALE: (Indiscernible).

24 THE COURT: -- they did not find any
25 fingerprints. The report does not mention that there

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1 were any fingerprints found, right, or something. The
2 report doesn't say that there were palm prints from
3 Kimani Gray found.

4 MR. CARDINALE: That's correct.

5 THE COURT: So it's --

6 MR. CARDINALE: Do you want us to state it that
7 way, your Honor?

8 THE COURT: Fine.

9 MR. HUESTON: We'll put our heads to it. This
10 is Mike Hueston. We'll put our heads to it and well
11 propound -- we'll take the first crack at it and propound
12 them.

13 THE COURT: Okay. And then I am going to tell
14 the defendants they have an obligation to admit whatever
15 they can admit.

16 MR. SCHEINER: (Indiscernible) denied to their
17 -- whatever their reports were taken from were just not
18 correct. In other words, they --

19 THE COURT: Okay. That's fine. Can I make a
20 suggestion? Okay. So plaintiffs, just give a roadmap of
21 the points -- I mean, of where -- whatever requests you
22 are propounding, cross-reference it to the page on the
23 reports.

24 MR. CARDINALE: Okay, your Honor.

25 THE COURT: Okay. And I will shorten the

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1 defendant's time to twenty days -- better make it twenty-
2 one, so we will -- it will end up on whatever day of the
3 week it is. Okay?

4 Anything else?

5 MR. SCHEINER: Yes, your Honor, there is
6 something that we raised with the plaintiffs earlier
7 today concerning some witnesses that I would like to
8 depose in light of Ms. King's (ph.) testimony.

9 Ms. King, as you know, (indiscernible) --

10 THE COURT: I'm sorry, you just faded. You
11 just faded. Hello?

12 MR. SCHEINER: Oh, I am sorry, your Honor.
13 Anyway, Ms. King said -- gave a statement, you know,
14 favorable to the plaintiff in the case during her
15 testimony and we, at least, view it as different than the
16 statement that she initially (indiscernible) after the
17 incident to IAB.

18 During the interim, after her first statement,
19 she spoke to several people. One of them was Geraud
20 Gray, Kimani Gray's father. He is an executor of the
21 estate but he is not a plaintiff in this case. So we
22 attempted to depose him early in the case and found that
23 the draft that we had for him, which I think we got from
24 plaintiff's counsel, was not a correct address. There
25 was nothing there, the process server told us. And we

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1 never (indiscernible) a new address for him.

2 But this testimony make his deposition more
3 important because he was the first person on the Gray
4 side to have contact with Ms. King and that occurred very
5 soon after the event.

6 They went together to Sanford Rubenstein's
7 office, your Honor, may know he is a lawyer who is
8 (indiscernible) cases, there was no testimony that he
9 represented anyone in connection with it, certainly not
10 -- the witness said he was not her lawyer. But they went
11 there together and together they called the Daily News.

12 We would like to depose Mr. Rubenstein about
13 what the witness said to him and the circumstances, you
14 know, that brought her to his office. Again, this was
15 shortly after the incident.

16 The third witness is somebody that Ms. King
17 identified as an acquaintance of her who put her in touch
18 with Geraud Gray. We think it's likely that this
19 acquaintance discussed the incident with Ms. King, given
20 that. And so, we would like to find and depose that
21 person. I apologize that I don't have the name offhand
22 but she gave a name during the deposition.

23 So this is going to take a little bit of time,
24 I think not that much, but Mr. Rubenstein certainly is
25 available, I assume, (indiscernible) but the Geraud Gray,

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1 we had difficulty. As I said, we -- right now, we don't
2 have an address (indiscernible). We think that because
3 he is an executor of the estate, that the plaintiff had
4 some obligation to produce him, he is essentially part of
5 the plaintiffs (indiscernible). And at least, there
6 should be an explanation of why that's not possible.

7 But all this is to say, I don't know if the
8 plaintiff has an objection to these depositions but we're
9 going to need a little bit more time to make this happen
10 and I would get, you know, the three (indiscernible) to
11 allow it.

12 So the first question is can we have time to do
13 the deposition? The second one is can the plaintiffs
14 produce Mr. Gray or his current location?
15 (Indiscernible) can't produce (indiscernible).

16 MR. CARDINALE: Mike, do you want to speak as
17 to Mr. Gray?

18 MR. HUESTON: I mean, your Honor, we told Mr.
19 Scheiner this and it has to be over a year, if my memory
20 serves me. We don't represent Geraud Gray period. The
21 address I gave him is the one that he provided to, I
22 guess the Surrogate's Court in terms of having letters of
23 administration. That's all we have. We don't represent
24 him. We have no control over him. And so they have what
25 we have. They have the same ability to get an

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1 investigator and try to find him. We're under no
2 obligation to locate him and, you know, we've talked
3 about this.

4 You know, they've had really a very long period
5 of time to look into this issue and so, really we have
6 nothing further on that, your Honor.

7 THE COURT: Does your client -- does Carol Gray
8 know his address for contact information?

9 MR. HUESTON: I don't know that, your Honor.
10 And I would have to talk with Ms. Gray. You know, I am
11 not against making an inquiry and giving, you know, the
12 best information she has. And, you know, that's
13 something -- I would just note, your Honor, that I
14 believe Mr. -- it should be -- Ms. Gray and her daughter
15 were both questioned by Mr. Scheiner and asked questions
16 and this didn't come up at that point either, in terms of
17 getting information about Mr. Gray, you know, to my
18 knowledge.

19 But notwithstanding that, your Honor, you know,
20 I will contact Mr. Montgomery and Ms. Gray and see if
21 they have updated address and provide it.

22 THE COURT: Okay. Is there an objection?

23 MR. SCHEINER: That should be required. And if
24 I could just point out that Mr. Gray, his testimony is
25 much more important in light of Ms. King's appearance in

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1 the case and what she said and the fact that he was the
2 first person from the plaintiff's side to have contact
3 with her.

4 MR. HUESTON: Your Honor, the characterization
5 of plaintiff's side, Mr. Scheiner is a lawyer enough to
6 understand this language, okay? He is not on the
7 plaintiff's side. Okay? and Mr. Scheiner, you know,
8 your Honor, I do object to that, this sort of conflating
9 of relationships, okay. That is not a true relationship
10 and I am not going to stand for it, okay? He is an
11 individual.

12 THE COURT: Anyway, I heard you the first time,
13 Mr. Hueston.

14 MR. HUESTON: I'll reach out, your Honor.

15 THE COURT: Obviously, if there is any action
16 with respect to the estate and he's still administrator
17 of the estate --

18 MR. HUESTON: That's my -- yes, your Honor.

19 THE COURT: Okay.

20 MR. HUESTON: He was the administrator -- we
21 understand that, your Honor, and that's why -- your
22 Honor, I want to just put this in context. We didn't
23 hear about Mr. Geraud Gray again until literally an hour
24 ago.

25 THE COURT: Okay. Well --

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1 MR. HUESTON: So it's not like we've had
2 discussions about this. You know, we told him this
3 information, you know, over a year ago, you know, and now
4 it's come up on the date of this conference.

5 Your Honor, we'll reach out to Ms. Gray, you
6 know, get the best address she has and we'll forward it
7 over to the other side but we don't control him. We
8 don't make any representation about having him appearing
9 at depositions.

10 MR. SCHEINER: Your Honor, just to
11 (indiscernible) because the deposition did come up, we
12 did ask Ms. Gray about him and where he is. The address
13 that she gave us at that time is the same one that we
14 already had. So, in other words, it didn't work the
15 first time. So, you know, the question is is there any
16 other -- I mean, there's still --

17 THE COURT: Mr. Scheiner, you are not without
18 resources to try to locate Mr. Gray and I am asking the
19 plaintiffs to cooperate -- plaintiff's counsel to confer
20 with your clients to see if they can get a better address
21 and/or other contact information.

22 MR. SCHEINER: Your Honor, we'll do that.

23 THE COURT: The issue really is whether or not
24 there ought to be an extension of discovery and since I
25 am going to extend discovery to resolve this issue of the

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1 request to admit, then I will grant an extension within
2 whatever time period we discuss. I am giving the
3 defendants three weeks to respond to reformulate the
4 request. So I will extend discovery by four weeks. And
5 I'll extend discovery for the deposition of Mr. Gray.

6 Now, the other two, I think that nonparty -- I
7 mean, they're both nonparties, obviously. Ms. King's
8 friend, what are you going to depose her on that Ms. King
9 said she's going to lie?

10 MR. SCHEINER: I don't know what they talked
11 about, your Honor. I don't know how it came up, what Ms.
12 King told her happened. So --

13 THE COURT: Why don't you ask Ms. King?

14 MR. SCHEINER: Also, if they talked about the
15 shooting and it ended up at the person referred Ms. King
16 to Geraud Gray. So it seems to me that she's an
17 important connection between Gray, an executor of the
18 estate and we don't know what was said. It doesn't have
19 to be a long deposition. We would certainly try to talk
20 to her first. We don't know what she would tell us.
21 Without a deposition we want to phrase it (indiscernible)
22 certainly as a strong possibility that it's something
23 that we wanted to do. (Indiscernible) it's really the
24 same issue that it --

25 THE COURT: Look, we're going to encounter the

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1 same problems here with Mr. Rubenstein. You know, if Ms.
2 King went to confer with Mr. Rubenstein, are you going to
3 then move to compel Mr. Rubenstein to testify about his
4 conversations with Ms. Gray -- I mean, Ms. King?

5 MR. SCHEINER: All that said, King did not --
6 King told us she did not go to Mr. Rubenstein to get a
7 lawyer. There's no suggestion that it happened and Paul
8 -- Paul, I think that she said it wasn't the case. We
9 asked her who her lawyers were, that came up.

10 THE COURT: So I am --

11 MR. SCHEINER: I mean --

12 THE COURT: -- sorry, why do you want to --
13 it's -- so why do you want to depose Mr. Rubenstein? Say
14 it again because, you know, you're catching us all by
15 surprise, really, bringing this up and I know Ms. King
16 was only fairly recently deposed but you should have made
17 that determination sooner rather than later to give
18 everybody more than an hour's notice about this.

19 Why don't you confer and you'll put it in
20 writing. I'm already behind. I will permit the
21 deposition. I will extend discovery by four weeks. So
22 the plaintiff needs to reformulate responses within a
23 week and the defendant's response will be due within
24 three weeks. So discovery is extended to April 27th.
25 And I'll permit the deposition of Mr. Gray. You'll

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1 confer on the other two witnesses so I can get a better
2 handle on what -- I'll get some facts on whether or not
3 it makes sense to depose these people. And we'll set a
4 conference for the April 28th.

5 MR. HUESTON: That's fine with me, your Honor.
6 Mike Hueston.

7 THE COURT: Okay. At 11 o'clock?

8 MR. HUESTON: That works.

9 MR. SCHEINER: Is that by phone, your Honor?

10 THE COURT: I was going to have it in person
11 but is the City planning to make a motion? I doubt it.
12 I assume not.

13 MR. SCHEINER: Did you say a dispositive motion
14 or a discovery motion?

15 THE COURT: A dispositive motion. I hope this
16 to be the end of discovery.

17 MR. SCHEINER: Well, your Honor, the --

18 THE COURT: Fact discovery.

19 MR. SCHEINER: -- the dispositive motion, this
20 is Alan Scheiner, it wouldn't be on the basis that
21 there's no factual dispute about the shooting. There is
22 a factual dispute that the shooting, given Ms. King's
23 testimony. Our arguments about Mr. Fraser really fall by
24 the wayside until trial since the plaintiffs have another
25 leg to stand on for that.

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1 I'm not a hundred percent sure there are not
2 other issues that could be the subject of dispositive
3 motions but maybe not. You know, that's something that
4 we have to think about.

5 THE COURT: Okay. Well, come in person and
6 we'll see where you are.

7 MR. HUESTON: Understood, your Honor.

8 THE COURT: All right.

9 MR. JOHNSON: Thank you.

10 THE COURT: So anyway, obviously if there are
11 going to be more discovery motions, I will expect them to
12 be filed sooner rather than later and I actually don't
13 give us enough time since -- here, let me push the
14 conference to May. So that there will be a week between
15 the close of discovery and the -- our next conference.
16 So May 4th? Is that good?

17 MR. HUESTON: May 4th is fine with me, your
18 Honor.

19 MR. JOHNSON: Fine with me, your Honor.

20 MR. SCHEINER: Yes, your Honor.

21 THE COURT: Okay. May 4th at 11. Okay.

22 MR. HUESTON: Thank you, your Honor.

23 THE COURT: All right. Now I am going to my
24 next conference.

25 MR. JOHNSON: Thank you.

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1 MR. HUESTON: Thank you, your Honor.

2 THE COURT: All right. Bye.

3 MR. SCHEINER: Thank you, your Honor.

4 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 5th day of April, 2016.


Linda Ferrara

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